No. 18-315

IN THE
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The False Claims Act establishes two distinct statute-of-limitations periods. Under 31 U.S.C. § 3731(b)(1), a False Claims Act civil action "may not be brought more than 6 years after the date" of the alleged violation. Under 31 U.S.C. § 3731(b)(2), a False Claims Act civil action "may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged violation.

The question presented is whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Neither The Parsons Corporation nor Cochise Consultancy, Inc. has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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BRIEF FOR PETITIONERS

The Parsons Corporation ("Parsons") and Cochise Consultancy, Inc. ("Cochise") respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

OPINIONS BELOW

The opinion of the court of appeals is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing a petition for a writ of certiorari until September 8, 2018. No. 17A1390. The petition was filed on September 7, 2018, and granted on November 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in full in the Addendum to this brief.

STATEMENT

The False Claims Act authorizes both the United States and private individuals, known as relators, to pursue civil claims for fraud perpetrated against the government. 31 U.S.C. § 3730(a)–(b). Until 1986, the False Claims Act had a single statute of limitations that required suit to be brought within six years of the alleged fraud. *Id.* § 3731(b)(1). In that year, prompted by concerns that the government was sometimes unable to discover the fraud and prepare a complaint within six years, Congress added a second limitations period. Drawing upon the language of a statute that tolls the generally applicable limitations periods for claims filed by the United States, 28 U.S.C. § 2416(c), Congress added 31 U.S.C. § 3731(b)(2), which states that suit may be brought within three years of when "the official of the United States charged with responsibility to act in the circumstances" learns the "facts material to the right of action" but no later than 10 years after the alleged violation.

Respondent Billy Joe Hunt learned of the alleged fraud in this case in 2006 but waited seven years to file this False Claims Act suit. Even though the United States declined to intervene in the suit—and the concerns that led Congress to enact Section 3731(b)(2) therefore were not implicated—the Eleventh Circuit held that Hunt could invoke the three-year limitations period in Section 3731(b)(2). The court further held that, even though Hunt had known about the alleged fraud for seven years, the complaint should not be dismissed as time-barred because he filed suit within three years of informing the government of the alleged fraud.

The Eleventh Circuit's dual holdings—that relators may invoke Section 3731(b)(2) in suits where the United States itself is not a party, and that the limitations period in such cases is triggered by the knowledge of the United States government, rather than the knowledge of the relator—rely on a hyperliteral reading of the statutory language that this Court has explicitly disavowed when construing this same statutory provision. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). When the language of Section 3731(b)(2) is read "in context," *id.* at 415, and in light of the statutory structure, purpose, and history as well as the obligation to avoid "counterintuitive results" where possible, it becomes apparent that Section 3731(b)(2) is only available where the government filed suit or intervened in the action. *Id.* at 421.

Moreover, even if Section 3731(b)(2) can be invoked by a relator in the absence of government intervention, this Court should mitigate the congressionally unintended, arbitrary consequences of that interpretation by holding that the limitations period in such cases is triggered by the knowledge of the relator, not the United States government.

Either of these alternative readings of Section 3731(b)(2) is sufficient to compel reversal and the dismissal of Hunt's untimely complaint.

1. Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). The False Claims Act has been amended on multiple occasions since then, and, in its current iteration, it imposes civil liability in the form of treble damages,

as well as civil penalties, on persons who make false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a); *see also* 28 C.F.R. § 85.3(a)(9) (inflation adjustment establishing civil penalties of up to $11,000 per claim for violations before November 2, 2015).

A False Claims Act suit can be filed either by the Attorney General, 31 U.S.C. § 3730(a), or by a private relator suing on the federal government's behalf, *id.* § 3730(b)(1).[1] A relator may recover up to 30% of the proceeds of a successful action, as well as attorneys' fees and costs. *Id.* § 3730(d). The relator must file a complaint under seal within the statute of limitations prescribed by Section 3731(b) and notify the government of the filing. The government then elects either to intervene in the suit or to allow the relator to continue the suit alone. *Id.* § 3730(b)(2).

Congress enacted the current version of the False Claims Act's statute of limitations in 1986. *See* Pub. L. No. 99-562, § 5, 100 Stat. 3153, 3158 (1986). Before that date, the False Claims Act's limitations provision simply provided that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see also* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). The 1986 amendment added a second, alternative limitations deadline of "3 years after the date when facts material to the right of action are known or reasonably should have been known by the

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[1] Section 3730(h) also creates a private right of action for individuals who believe they have been retaliated against by their employers for assisting in a False Claims Act investigation or proceeding.

official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). In enacting that amendment, Congress incorporated into the False Claims Act the language of 28 U.S.C. § 2416(c), which tolls the generally applicable statutes of limitations on claims filed by the United States when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances."

Although the statute of limitations in Section 3731(b) applies, without qualification, to a "civil action under section 3730," this Court recognized in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson* that Congress "used the term 'action under section 3730' imprecisely in § 3731 and . . . sometimes used the term to refer only to a subset of § 3730 actions." 545 U.S. at 418. The Court held that Congress did just that in Section 3731(d)—a provision establishing the burden of proof in False Claims Act suits—where it used the phrase "action brought under section 3730" to refer only "to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Id.* The Court found similar "imprecis[ion]" in Section 3731(b)(1), which—notwithstanding its broad reference to a "civil action under section 3730"—does not apply to False Claims Act retaliation actions under Section 3730(h) because applying Section 3731(b)(1), rather than the most analogous state statute of limitations, could lead to the anomalous outcome of a claim's being "time barred before it ever accrues." *Id.* at 421.

2. Parsons is an engineering, construction, technical, and management firm that provides services to federal, regional, and local government agencies, as well as to private industrial customers worldwide. Parsons performed numerous contracts for the United States government during the Iraq and Afghanistan wars, including a U.S. Army Corps of Engineers contract—referred to as the Coalition Munitions Clearance Project or the "CMC contract"—for the clean-up of munitions left behind by retreating or defeated enemy forces. Pet. App. 3a–5a. Cochise is a security-services firm that contracts with both the government and government contractors. Cochise was awarded a subcontract and task orders by Parsons under the CMC contract to provide security to Parsons employees, their subcontractors, and Iraqi nationals, among others. *Id.*

Respondent Billy Joe Hunt is a former Parsons employee who worked in Iraq on the CMC contract. Pet. App. 3a–5a. In his complaint, he alleges that, "some time prior to January 2006 until early 2007," petitioners defrauded the United States in connection with the CMC security subcontract awarded to Cochise. J.A. 44a.

According to Hunt's complaint, Parsons initially awarded the subcontract to an entity called ArmorGroup. Pet. App. 3a. But, Hunt alleges, Cochise then bribed an Army Corps of Engineers officer, Wayne Shaw, to direct Parsons employees, including Hunt, to issue a directive rescinding the initial award to ArmorGroup and awarding the contract to Cochise instead. *Id.* at 3a–4a. When the Parsons employees initially refused to issue the directive, Shaw allegedly forged one, *id.* at 4a, which Hunt claims to have personally observed, J.A. 39a.

Eventually, Hunt alleges, Cochise succeeded in obtaining the subcontract from Parsons and provided security services from February 2006 through September 2006. Pet. App. 5a. When Shaw left Iraq, Parsons reopened bidding on the contract and immediately awarded it to ArmorGroup. *Id.*

Several years later, on November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. Pet. App. 5a. As part of that interview, Hunt told the agents about the allegedly fraudulent scheme involving Cochise and Parsons relating to the munitions-clearing project. *Id.* Hunt was charged with federal crimes for his role in the separate kickback scheme and served ten months in prison. *Id.*

3. After his release from prison, Hunt filed this False Claims Act suit against petitioners under seal on November 27, 2013. He alleges that Cochise "fraudulently induced the government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a. The United States declined to intervene, and the complaint was thereafter unsealed. *Id.*

Petitioners moved to dismiss on the ground that the suit was barred by the six-year statute of limitations in Section 3731(b)(1) because Hunt had filed suit approximately seven years after the alleged fraud. Pet. App. 6a. Hunt conceded that his complaint would be time-barred under Section 3731(b)(1), but maintained that the action was nevertheless timely under Section 3731(b)(2) because it had been filed within three years of the date on which Hunt had informed

the government of the alleged fraud during his 2010 FBI interview. *Id.*

The district court concluded that Hunt could not rely on Section 3731(b)(2) to establish the timeliness of his complaint. Explaining that "[t]here is a split among the Circuit courts which have decided th[is] particular issue," the court held that the complaint was time-barred under either interpretation of Section 3731(b)(2) adopted by the courts of appeals. Pet. App. 36a–40a. Specifically, the district court held that Section 3731(b)(2)'s three-year statute of limitations either was unavailable to Hunt because the United States had declined to intervene in the action, or had expired because it began to run when Hunt learned of the alleged fraud in 2006. *Id.* at 37a. The district court therefore dismissed the complaint. *Id.* at 40a.

4. The Eleventh Circuit reversed. Explicitly rejecting the contrary conclusions of the Fourth and Tenth Circuits, the court of appeals held that a relator can rely on the limitations period established by Section 3731(b)(2) in cases where the United States has not intervened. Pet. App. 14a, 21a (citing *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006)). The Eleventh Circuit reasoned that "the phrase 'civil action under section 3730' in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene" and that "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene." *Id.* at 14a.

In so ruling, the Eleventh Circuit acknowledged this Court's statement in *Graham* that "Congress used the phrase 'action under section 3730' imprecisely throughout § 3731 'to refer only to a subset of § 3730 actions.'" Pet. App. 17a n.8 (quoting *Graham*, 545 U.S. at 417–18). The court of appeals nevertheless concluded that the type of "'counterintuitive results'" that prompted the Court to reject a literal reading of Section 3731(b) in *Graham* are not implicated in this case. *Id.* at 16a (quoting *Graham*, 545 U.S. at 421). In particular, the Eleventh Circuit rejected the Fourth Circuit's reasoning that Congress could not have intended to create the "'bizarre scenario'" where a "limitations period [is] triggered by a federal official's knowledge when the United States is not a party" to the case. *Id.* at 18a (quoting *Sanders*, 546 F.3d at 293). According to the Eleventh Circuit, although "it is generally the case that a discovery-based limitations period begins to run when a *party*—the plaintiff—knew or should have known about the fraud or claim," it would not be "absurd to peg a limitations period to a federal official's knowledge" where the United States is not a party to a False Claims Act case because "the United States remains the real party in interest and retains significant control over the case" even when it has not intervened. *Id.* at 19a.

In accordance with that reasoning, the court further held that, in cases where the United States has declined to intervene, the three-year limitations period in Section 3731(b)(2) is triggered by the United States government's knowledge of the alleged False Claims Act violation, not by the relator's knowledge. Pet. App. 30a. Rejecting the Ninth Circuit's view that by suing on behalf of the government, "the relator [becomes] a government agent and the government official charged with responsibility to act," the Eleventh

Circuit reasoned that "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." *Id.* (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Applying those dual holdings, the Eleventh Circuit reversed the district court's dismissal of Hunt's complaint. Because "Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure," the Eleventh Circuit concluded that the district court had "erred in dismissing his complaint on statute of limitations grounds." Pet. App. 31a.

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's holding that relators can invoke the three-year limitations period in Section 3731(b)(2) where the United States has not intervened in the case is contrary to the statute's language, structure, purpose, and history, and would create a cascade of congressionally unintended consequences.

A. When "read in its proper context," the language of Section 3731(b)(2) demonstrates that this limitations period is not available to relators in the absence of government intervention. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). The language of Section 3731(b)(2) does not include an explicit reference to relators and instead refers only to an "official of the United States." 31 U.S.C. § 3731(b)(2). In addition, this Court has already construed Section 3731(d)—which applies to "any action brought under section 3730," *id.* § 3731(d)—as "limited to § 3730(a)

actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 418. The nearly identical language at the outset of Section 3731(b)(2)—"[a] civil action under section 3730"—should be given the same meaning. In fact, Congress lifted the text of Section 3731(b)(2) from 28 U.S.C. § 2416(c), a tolling provision that applies *only* to claims filed by the United States. The Eleventh Circuit's hyperliteral reading of Section 3731(b)(2)—which began and ended with the conclusion that a non-intervened False Claims Act suit is a type of "civil action under section 3730"—ignores these contextual guideposts.

B. The "default rule[s]" governing statutes of limitations confirm Congress's intent to limit the availability of Section 3731(b)(2) to suits in which the United States is a party. *Graham*, 545 U.S. at 418. Section 3731(b)(2) is a tolling provision that links the start of the limitations period to discovery of the alleged False Claims Act violation. As this Court has recognized—and both common-law rules and state statutes demonstrate—tolling provisions delay the running of the statute of limitations until the "facts are, or should have been, discovered *by the plaintiff*." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) (emphasis added). According to the Eleventh Circuit, however, Section 3731(b)(2) tolls the statute of limitations until the United States government learns of the alleged fraud, even where, as here, the government itself is not a party to the case. The court of appeals did not identify any other example of a tolling rule linked to the knowledge of a nonparty.

C. The Eleventh Circuit's interpretation of Section 3731(b)(2) would also lead to a host of "counterintuitive results" that Congress could not possibly have

intended. *Graham*, 545 U.S. at 421. For example, the Eleventh Circuit's rule would afford relators a *longer* period to sue than the government in some situations where a relator and the government are similarly situated. The Eleventh Circuit's interpretation of Section 3731(b)(2) would also render the six-year limitations period in Section 3731(b)(1) superfluous in virtually all cases in which the United States declines to intervene. In fact, relators would have a strong incentive to delay disclosing fraud to the government and to wait the full ten years to file suit in order to maximize their recovery in cases of ongoing fraud—delaying public exposure of the fraud and the government's eventual financial recovery. In addition, under the Eleventh Circuit's rule, the government would be burdened with extensive discovery about whether and when it learned of the alleged fraud in cases where it made the affirmative decision not to intervene. Interpreting Section 3731(b)(2) as limited to cases in which the United States is a party would avoid all of these irrational outcomes.

D. Finally, the legislative history demonstrates that Congress enacted Section 3731(b)(2) to address concerns about the ability of the government to discover fraud and prepare a complaint within the then-exclusive six-year limitations period. The legislative record does not include any similar expressions of concern about the ability of relators to uncover fraud and file suit in a timely manner. Congress referred exclusively to "the government" in explaining its rationale for Section 3731(b)(2) and was careful to distinguish between the government and relators throughout the legislative record.

Because all of the relevant interpretive guideposts demonstrate that Congress did not intend to make

Section 3731(b)(2) available where the United States declines to intervene—and it is undisputed that Hunt's complaint was filed more than six years after the alleged False Claims Act violations—Hunt's suit is untimely.

II. If the Court nevertheless concludes that Section 3731(b)(2) is available in cases where the United States has not intervened, it should hold that the limitations period in such cases is triggered by the knowledge of the relator, not the government.

Although the "imprecise[ ]" language of Section 3731(b)(2) does not expressly reference relators, *Graham*, 545 U.S. at 418, it is apparent from the statutory context that, when a relator files suit on behalf of the government and the government declines to intervene, the relator is the "official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). In such cases, the United States' "interests [are] represented" by the relator, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934–35 (2009), who brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, as to the portion of the recovery paid to the government, acts as a "statutorily designated agent of the United States," *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *see also Webster's Third New Int'l Dictionary* 1567 (2002) (an official is a "person authorized to act for a government"). Linking the limitations period in Section 3731(b)(2) to the relator's knowledge in non-intervened cases is also consistent with the "default rule," *Graham*, 545 U.S. at 418, that tolling provisions are tied to the knowledge of the plaintiff—not a third party, *Credit Suisse*, 566 U.S. at 227.

By decoupling the start of the limitations period from the relator's knowledge, the Eleventh Circuit's contrary rule would create anomalous circumstances in which the claims of diligent relators would be time-barred but the claims of relators who intentionally waited years to file suit would be timely. Deeming the relator to be the relevant "official of the United States" would avoid those congressionally unintended consequences. It would also mitigate a number of the counterintuitive results that would otherwise flow from making Section 3731(b)(2) available in non-intervened cases by, for example, eliminating the possibility that relators could be treated more favorably than the government in some cases and relieving the government of limitations-related discovery burdens in cases where it has not intervened.

Because it is undisputed that Hunt filed suit more than three years after he learned of the alleged fraud, his suit is time-barred under this alternative interpretation of Section 3731(b)(2).

ARGUMENT

Section 3731(b)(2) of the False Claims Act provides that a "civil action under section 3730 may not be brought more than 3 years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). When "read in its proper context" and in light of the statutory structure, purpose, and history, it is evident that Congress did not intend Section 3731(b)(2) to be available to relators where the United States has not intervened in the case. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S.

409, 415 (2005). At a minimum, the Court should mitigate the "counterintuitive results" of permitting relators to invoke Section 3731(b)(2) by concluding that the three-year limitations period begins to run based on the knowledge of the relator, rather than the knowledge of the United States government, where the United States is not a party to the False Claims Act case. *Id.* at 421. Under either interpretation, the judgment must be reversed.

I. SECTION 3731(B)(2) APPLIES ONLY IN SUITS BROUGHT BY THE UNITED STATES OR IN WHICH THE UNITED STATES INTERVENES.

The three-year limitations period established by Section 3731(b)(2) cannot be invoked by relators where the United States is not a party to the case. The Eleventh Circuit's contrary conclusion rests on an unduly literal reading of Section 3731(b)(2) that ignores the interpretive approach this Court applied in *Graham* when construing this "imprecise[ ]" statutory provision. 545 U.S. at 418.

In *Graham*, the Court held that the six-year statute of limitations in Section 3731(b)(1) does not apply to False Claims Act retaliation claims under Section 3730(h) and that those claims are instead subject to the most analogous state statute of limitations. 545 U.S. at 422. The Court reached this conclusion even though Section 3731(b)(1) applies to a "civil action under section 3730" and thus, by its terms, would appear to encompass retaliation claims under Section 3730(h). Emphasizing that "[s]tatutory language has meaning only in context," the Court construed Section 3731(b) in the context of the broader False Claims Act and with due regard for the necessity of avoiding "counterintuitive results." *Id.* at 415, 421.

The Court began by highlighting that, whereas Section 3731(b)(1) links the start of the limitations period to "the date on which the violation of section 3729 is committed," *Graham*, 545 U.S. at 415 (internal quotation marks omitted), retaliation claims under Section 3730(h) "need not allege that the defendant submitted a false claim" in violation of Section 3729, "leaving the limitations period without a starting point," *id.* at 416. "Applying § 3731(b)(1) to [False Claims Act] retaliation actions" thus "sits uneasily with § 3731(b)(1)'s language, which assumes that well-pleaded 'action[s] under section 3730' to which it is applicable include a 'violation of section 3729' certain from which to start the time running." *Id.* (second alteration in original). That "textual anomaly," the Court reasoned, "at a minimum, shows that § 3731(b)(1) is ambiguous about whether 'action under section 3730' means all actions" or simply actions under subsections (a) and (b). *Id.*

To resolve that ambiguity, the Court relied on two interpretive guideposts. First, looking to the other provisions of the False Claims Act, it emphasized that "the very next subsection of the statute"—which is now found in Section 3731(d)—"also uses the similarly unqualified phrase 'action brought under section 3730'" to refer only to "§ 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 417–18 (citation omitted). That "implicit limitation of the phrase" showed that "Congress used the term 'action under section 3730' imprecisely in § 3731" and "sometimes used the term to refer only to a subset of § 3730 actions." *Id.* at 418. Accordingly, it was "reasonable to read the same language in § 3731(b)(1) to be likewise limited." *Id.*

Second, the Court relied on the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham*, 545 U.S. at 418. Applying this rule to the "two plausible constructions of [the] statute of limitations," the Court concluded that Section 3731(b)(1) does not apply to retaliation claims because, if it did, the statute of limitations would "begin[ ] to run . . . on the date the actual or suspected [False Claims Act] violation occurred," not on the date of the retaliatory conduct. *Id.* at 419, 421.

The Court further explained that its interpretation of Section 3731(b)(1) would avoid the "counterintuitive results" that would arise from applying the provision to retaliation claims, such as the possibility that a retaliation claim could be "time barred before it ever accrues." *Graham*, 545 U.S. at 421. This consideration confirmed the Court's conclusion that retaliation claims should be subject to the most analogous state statute of limitations, not to Section 3731(b)(1). *Id.* at 422.

Applying *Graham*'s interpretive approach to Section 3731(b)(2)—reading the plain language in light of the statutory context, structure, purpose, and history and with due regard for avoiding counterintuitive results—demonstrates that Section 3731(b)(2) is only available where the United States filed suit or intervened in the action.

A. The Text, Context, And Statutory Antecedents Of Section 3731(b)(2) Establish That It Applies Only To Suits In Which The United States Is A Party.

When read in the broader context of Section 3731 as a whole and viewed in conjunction with its statutory origins, the plain language of Section 3731(b)(2) establishes that the provision is not available to relators where the United States has declined to intervene in a False Claims Act suit.

First, Section 3731(b)(2) does not expressly mention relators. It refers instead to "the official of the United States charged with responsibility to act in the circumstances" and starts the three-year limitations period on the date when that official knew, or should have known, of the alleged fraud. 31 U.S.C. § 3731(b)(2). As discussed in detail below, it is a well-established default rule that statutes of limitations that are tied to the discovery of the underlying violation start to run based on *the plaintiff's* knowledge. *See infra* Part I.B. If Congress had intended to diverge from this settled limitations principle by making Section 3731(b)(2) available to relators where the United States has not intervened and by tying the limitations period to the nonparty government's knowledge, it would have included explicit language to that effect. The absence of any language expressly authorizing relators to invoke Section 3731(b)(2) where the United States is not a party is a strong indication that Congress intended to adhere to the default rule and thus did not intend to make Section 3731(b)(2) available where the government did not file suit or intervene in the action. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate

a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotation marks omitted).

Second, this Court has already held in *Graham* that Congress used the language "action under section 3730" elsewhere in Section 3731 to refer only to suits filed by the United States or in which the United States has intervened. In particular, the Court concluded that Section 3731(d)—which provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence"—is limited to "the types of § 3730 actions in which the United States necessarily participates." 545 U.S. at 418.[2] Despite the broad "any action" language, the Court held that Section 3731(d) is "limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Id.* "Otherwise, the United States would be 'required to prove all essential elements of the cause of action[ ]' . . . in all § 3730 actions, regardless of whether it participated in the action." *Id.* (quoting 31 U.S.C. § 3731(d)).

The fact that Congress used the phrase "any action brought under section 3730" in Section 3731(d) to refer only to suits filed by the United States or in which the United States has intervened is strong textual evidence that Congress used the nearly identical language—"[a] civil action under section 3730"—in

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[2] This provision was found in Section 3731(c) when *Graham* was decided, but was redesignated as Section 3731(d) in 2009. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

Section 3731(b)(2) to apply to the same subset of Section 3730 actions. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted). Indeed, the textual similarities between Section 3731(b)(2) and Section 3731(d) are particularly powerful because both provisions explicitly refer to the "United States."[3]

Third, when Congress enacted Section 3731(b)(2) in 1986, it lifted the statute's text from a tolling provision that applies only to suits brought by the government. Congress copied the text of Section 3731(b)(2) from 28 U.S.C. § 2416(c), which tolls the generally applicable limitations periods in 28 U.S.C. § 2415 for civil claims brought by the United States. Section 2416(c) states that the various limitations periods established by Section 2415 are tolled when "facts material to the right of action are not known and reasonably could not have been known by an official of the United States charged with responsibility to act in the circumstances." 28 U.S.C. § 2416(c). Congress incorporated that same language into Section 3731(b)(2). *See* 132 Cong. Rec. S11,238, S11,244 (Aug. 11, 1986) (statement of Sen. Grassley) ("The committee has added a tolling provision[ ] to the False Claims

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[3] To be sure, when used in Section 3731(b)(1), "[a] civil action under section 3730" does encompass relator-initiated suits in which the United States has not intervened because, unlike with Section 3731(b)(2), the statutory text, structure, purpose, and history provide no indication that Congress intended to exclude those suits from Section 3731(b)(1). The distinction between the reaches of Sections 3731(b)(1) and 3731(b)(2) is simply another example of Congress's "imprecis[ion]" in drafting Section 3731. *Graham*, 545 U.S. at 418.

Act which is adopted directly from 28 U.S.C. 2416(c)."). Section 3731(b)(2)'s "transcription of statutory language supports the conclusion that the text of Section 3731(b)(2) lengthens the [False Claims Act's] limitations period only when the government is a party." *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 294 (4th Cir. 2008); *cf. Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("[B]ecause . . . there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration," courts should not impose a limitations rule in RICO suits that "would clash with the limitations imposed on Clayton Act suits.").

The Eleventh Circuit discounted this textual evidence of Congress's intent to limit the availability of Section 3731(b)(2) to suits in which the United States is a party in favor of a single-minded focus on Congress's use of the unqualified language "civil action under section 3730"—which, on its face, "includes § 3730(b) *qui tam* actions when the government declines to intervene"—in Section 3731(b)(2). Pet. App. 14a. But if this Court had applied the Eleventh Circuit's simplistic mode of analysis in *Graham*, it would have begun and ended its statutory interpretation with the fact that a retaliation claim under Section 3730(h) is a type of "civil action under section 3730." The Court rejected that artificially narrow approach in favor of a more comprehensive inquiry that interpreted the relevant language of Section 3731(b)(1) "in its proper context." *Graham*, 545 U.S. at 415.

Graham was no outlier in that regard. The Court, time and again, has endorsed that holistic approach to statutory interpretation and recently reaffirmed that its "duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480,

2489 (2015) (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)); *see also id.* at 2495 ("while the meaning of the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' may seem plain 'when viewed in isolation,' such a reading turns out to be 'untenable in light of [the statute] as a whole'") (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (alterations in original)).

Applying that same mode of interpretation here reveals multiple textual indications that Congress did not intend to make Section 3731(b)(2) available in suits where the United States is not a party.

B. Default Limitations Rules Support Restricting Section 3731(b)(2) To Suits In Which The United States Is A Party.

The textual evidence that Section 3731(b)(2) is not available to relators where the government has not intervened in the case is bolstered by the well-established tolling principles that formed the backdrop for Congress's enactment of Section 3731(b)(2).

This Court emphasized in *Graham* that Section 3731(b) should be read "in keeping with the default rule[s]" that guide how "Congress generally drafts statutes of limitations." 545 U.S. at 418. In *Graham*, those default rules supported the conclusion that Section 3731(b)(1) does not apply to retaliation claims under Section 3730(h) because limitations periods generally "begin when the cause of action accrues" and, if Section 3731(b)(1) were applied to retaliation claims, the limitations period would run from the date of the underlying fraud, rather than from the date of the employer's retaliatory conduct, which is when the retaliation claim accrues. *Id.* The Court therefore declined

to follow the literal language of Section 3731(b)(1)—which is broad enough to encompass retaliation claims—because the result would be inconsistent with the "standard rule" that "the limitations period commences when the plaintiff has a complete and present cause of action." *Id.* (internal quotation marks omitted); *see also Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (default limitations rules control when text does not "clearly indicate[ ] an intent to displace" them).

Here, the relevant default rules confirm that Congress did not intend Section 3731(b)(2) to apply where the United States is not a party to the case. By delaying the start of the limitations period until the discovery of material facts about the alleged fraudulent conduct, Section 3731(b)(2) creates a tolling or "discovery" rule. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010). Tolling rules have long-standing common-law antecedents. *See Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) ("Deeply rooted in our jurisprudence," the principle that "no man may take advantage of his own wrong" "has frequently been employed to bar inequitable reliance on statutes of limitations."). As Congress recognized when enacting Section 2416(c)—the statutory model for Section 3731(b)(2), *see supra* Part I.A—tolling rules also have been codified by many States. *See* S. Rep. No. 89-1328, at 6 (1966) (noting that "[t]his type of exclusion" from the running of a limitations period "is to be found in the law of many States in both fraud and tort limitations").

Many of the state statutes codifying tolling rules explicitly provide that the limitations period begins to run when the party entitled to bring a claim learns about, or should have learned about, the material

facts.[4] Likewise, in applying these common-law and statutory tolling rules, courts have consistently stated that tolling is based on the knowledge and actions of the *plaintiff*, not a third party.[5] As this Court has explained, "[i]t is well established . . . that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases"—and the limitations period begins to run—"when those facts are, or should have been, discovered *by the plaintiff*." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) (emphasis added). This rule ensures that if "a

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[4] *See, e.g.*, Me. Rev. Stat. tit. 14, § 859 ("If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action, except as provided in section 3580."); Mich. Comp. Laws § 600.5855 ("If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.").

[5] *See, e.g.*, *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) ("Under [the discovery rule], accrual is delayed until the plaintiff has discovered his cause of action.") (internal quotation marks omitted); *United States v. CFW Constr. Co.*, 649 F. Supp. 616, 619 (D.S.C. 1986) ("Federal statutes of limitation in fraud cases are universally tolled until the plaintiff knew or should have known of the facts giving rise to its cause of action."); *Hames v. N. Ill. Gas Co.*, 388 N.E.2d 1127, 1128 (Ill. App. Ct. 1979) ("The discovery rule grew out of cases in which the injury was not readily ascertainable and in which justice was accordingly served by permitting a plaintiff to sue within the statutory period as computed from the time he knew or should have known of the right of action.").

plaintiff has been injured by fraud and remains in ignorance of it," he does not lose his right to sue. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (internal quotation marks omitted); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) ("[E]quitable tolling [is] a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'") (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)).

The text of Section 3731(b)(2) reflects these fundamental characteristics of tolling rules: It delays the running of the three-year limitations period until the "official of the United States charged with responsibility to act in the circumstances" knew "or reasonably should have . . . known" the "facts material to the right of action." 31 U.S.C. § 3731(b)(2). It is "in keeping with the default rule[s]" that guide how "Congress generally drafts statutes of limitations," *Graham*, 545 U.S. at 418, to toll the statute of limitations under Section 3731(b)(2) based on the knowledge of the relevant United States official in suits filed by the United States or in which the United States intervenes. But it would be flatly at odds with the background rules embodied in settled common-law tolling principles and modern tolling statutes to permit a relator to invoke Section 3731(b)(2) based on the knowledge of a government official, where the United States itself is not a party to the suit.

The court of appeals was untroubled by the sheer novelty of its ruling because, in its view, "even though the United States is not a party to a non-intervened *qui tam* action," it "remains the real party in interest and retains significant control over the case." Pet.

App. 19a–21a. But despite what the Eleventh Circuit described as the United States' "unique role" in False Claims Act litigation, *id.* at 21a, the fact remains that "[t]he United States . . . is a party to a privately filed [False Claims Act] action *only* if it intervenes." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (emphasis added; internal quotation marks omitted). The Eleventh Circuit cited no case outside of the False Claims Act setting in which a court tied the running of a statute of limitations to the knowledge of a real party in interest who was not also an *actual* party to the case, and no statutory antecedent for a tolling rule based on the knowledge of a non-party. There is no reason to believe that Congress intended to break new legal ground—and depart from settled default tolling principles—when it enacted Section 3731(b)(2).

C. The Eleventh Circuit's Interpretation Of Section 3731(b)(2) Would Lead To Counterintuitive Results.

Authorizing relators to invoke Section 3731(b)(2) where the United States is not a party and tying the limitations period to the knowledge of the United States government would create precisely the type of "counterintuitive results" that the Court sought to avoid in *Graham* when it refused to apply Section 3731(b)(1) to retaliation claims. 545 U.S. at 421.

First, the Eleventh Circuit's rule would lead to the anomalous result that relators would have a longer period to sue than the government in some scenarios where a relator and the government are similarly situated. Under the Eleventh Circuit's rule, if a relator learns about fraudulent activity one day after it occurred, the relator would have a full ten years to file suit, as long as the government did not learn about

the fraud in the interim, because the limitations period in Section 3731(b)(2) would never be triggered. But if the government learns about the fraud the day after it occurred, the government would have only six years to file suit because the limitations period in Section 3731(b)(2) would begin to run immediately and therefore would expire before the close of the six-year limitations period in Section 3731(b)(1).

There is no reason that Congress would have treated a relator more favorably than the government itself in crafting the False Claims Act's statute of limitations. Indeed, the False Claims Act generally affords the government *greater* rights than relators. *See, e.g.*, 31 U.S.C. § 3730(e)(3) (relators cannot bring actions based on "allegations or transactions" at issue in civil or administrative proceedings to which the government is a party); *id.* § 3730(e)(4) (providing for dismissal of suits based on publicly disclosed information unless the relator is an "original source of the information"); *id.* § 3730(b)(1) (relator may not dismiss an action without the government's approval); *id.* § 3730(c)(2)(A) (government may dismiss an action over the relator's objections). And as discussed in Part I.D, *infra*, Congress was acutely aware when enacting Section 3731(b)(2) that the government faced unique difficulties in investigating and prosecuting False Claims Act suits. It would have been irrational for Congress nevertheless to afford relators a *longer* period to sue after discovering fraud than the government.

Second, under the Eleventh Circuit's ruling, the six-year limitations period established in Section 3731(b)(1) would become "superfluous in nearly all" relator-initiated cases in which the United States does not intervene. *Sanders*, 546 F.3d at 295. The six-year

period would apply in non-intervened suits only when the government learned about the fraud within the first three years of its occurrence but then declined to file its own suit. But such cases are likely to be rare. After all, both Section 3731(b)(2) and the *qui tam* provisions of the False Claims Act are premised on the notion that fraud is often difficult for the government to detect. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) ("Congress viewed qui tam prosecutions as providing a means to achieve *rapid* exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities."). And, where the government does detect fraud, it will often bring its own False Claims Act suit against the perpetrator. Thus, in the vast majority of relator-initiated cases, it is the relator—not the government—who discovers the fraud. The Eleventh Circuit's rule means that, in each of those cases, the limitations period in Section 3731(b)(2) will give the relator a longer period to sue—a full ten years from the date of the alleged violation—than Section 3731(b)(1), effectively nullifying one of the two limitations provisions established by Congress. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("it is generally presumed that statutory language is not superfluous").

Third, because the Eleventh Circuit's rule would provide relators with a full ten years to file suit whenever the government did not learn of the fraud, it would create a strong incentive, in cases of ongoing fraud, for relators to decline to disclose the fraud to the government and instead wait the full ten years to file suit. This delay would allow the maximum

amount of damages from the ongoing misconduct to accrue before suit is filed.[6]

It would be absurd to presume, however, that Congress intended to empower relators to "extend the limitations period at will"—and to enhance their ultimate financial recovery—by keeping the government in the dark about fraudulent conduct that is continuing to be perpetrated at the government's expense. *Sanders*, 546 F.3d at 295; *see also Corley v. United States*, 556 U.S. 303, 317 (2009) (reasoning that "the absurdities of literalism . . . show that Congress could not have been writing in a literalistic frame of mind"). In fact, one of the principal purposes of the 1986 amendments to the False Claims Act was to "encourag[e] *prompt* action on the part of relators." *Sikkenga*, 472 F.3d at 725 (emphasis added); *see also* S. Rep. No. 99-345, at 11 (1986) ("'Prosecutions conducted by [relators] compare with [those conducted by the government] as the enterprising privateer does to the slow-going public vessel.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

Congress's interest in encouraging relators to file suit promptly is fundamentally at odds with a limitations rule permitting relators to intentionally delay up to *ten years* before filing suit. *Cf. Rotella*, 528 U.S. at 558–59 ("extend[ing] the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete" would have

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[6] Relators often allege fraudulent activity that spans a number of years. *See, e.g., United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1303 (11th Cir. 2002) (relator alleged "decade-long campaign to defraud the Government"); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 267 (D.D.C. 2002) (relator alleged a "twelve year fraudulent scheme").

"patently disserve[d] the congressional objective of a civil enforcement scheme . . . aimed at rewarding the swift who undertake litigation in the public good"). Not only would the delay create the possibility that the fraudulent conduct would continue at least until suit is filed, but even where the fraud did not continue, the government would be prejudiced by the relator's delay because any potential recovery would be postponed. The government could also lose the ability to file a criminal fraud suit against the perpetrator within the applicable five-year statute of limitations. *See* 18 U.S.C. §§ 287, 3282.

In addition, allowing relators to delay would undercut the overarching goal of the False Claims Act in general—and the 1986 amendments in particular—of "enhanc[ing] the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99–345, at 1. Relators could wait to sue "until evidence has been lost, memories have faded, and witnesses have disappeared," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (internal quotation marks omitted), reducing or eliminating the government's chances of recovery. Alternatively, relators could purposefully preserve their own evidence in the years before filing suit, while the defendant—who would lack notice of the impending suit—would have little reason to take similar steps, leaving the relator with the type of unfair evidentiary advantage that statutes of limitations are designed to foreclose. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 473 (1975) ("Statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise.").

The Eleventh Circuit deemed it unlikely that relators would delay filing suit for up to ten years in an effort to maximize their recovery because the False Claims Act gives relators incentives to sue promptly, such as the risk that the relator would lose the right to sue at all if another relator sued or the fraud became public. Pet. App. 23a–24a. But these incentives would have little effect whenever a relator knew that only a small number of other persons were aware of the fraud. Indeed, those incentives had no impact in this case, where Hunt waited seven years after he learned of the alleged fraud to file suit. And Hunt is not alone in his dilatory approach. There are many other examples of False Claims Act cases that were filed by relators years after they learned of the alleged violation.[7]

The Eleventh Circuit also emphasized that a relator's recovery may be reduced if the relator delays in filing suit, Pet. App. 24a, but delay was not among the factors Congress originally contemplated would reduce a relator's recovery. *See* S. Rep. No. 99–345, at 28 (listing as factors for determination of recovery percentage: "(A) the significance of the information provided to the Government; (B) the contribution of the person bringing the action to the results obtained; and (C) whether the information which formed the basis for the suit was known to the Government"). It was not until 1996 that delayed disclosure first appeared in Department of Justice guidelines as a relevant factor for determining a relator's share of the recovery.

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[7] *See, e.g.*, *United States ex rel. Malloy v. Telephonics Corp.*, 68 F. App'x 270, 273 (3d Cir. 2003) (nine and a half years after learning of the fraud); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996) (seven years after learning of the fraud).

See Dep't of Justice Guidelines, The False Claims Act: Fraud Against the Government § 8:4; *see also United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 83–84 (D.D.C. 2012) ("In December of 1996, the Department of Justice issued a set of 'Relator's Share Guidelines.'"). The possibility that a reduced award would deter delay by relators therefore could not have informed Congress's decision-making about whether to make Section 3731(b)(2) available to relators where the United States has not intervened.

Finally, the Eleventh Circuit's interpretation of Section 3731(b)(2) would require discovery into the government's knowledge even when it declined to intervene in a relator's suit, which would "cause innumerable headaches for both defendants and the government during discovery." *Sanders*, 546 F.3d at 295. The practical difficulties of establishing the government's knowledge when it is not a party to the case are manifest. Relators and defendants seeking to determine whether a claim was timely would need to discover: (1) what the government knew about the alleged fraud and when it first came to know the "facts material to the right of action"; (2) if the government did not know about the alleged fraud or learned about it only well after it occurred, when the government "reasonably should" have learned about the fraud; and (3) which "official of the United States" was "charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). The Eleventh Circuit made clear that it anticipated precisely this type of discovery to resolve the statute-of-limitations issue in this litigation. *See* Pet. App. 31a n.12 ("if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt's claims could still be barred by the statute of limitations").

Each of these inquiries would require burdensome and time-consuming investigation, which could be exacerbated depending on the nature of the alleged fraud and the number and size of the agencies involved. As the Court has emphasized, "[d]etermining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts" because "[a]gencies often have hundreds of employees, dozens of offices, and several levels of leadership." *Gabelli v. SEC*, 568 U.S. 442, 452 (2013). Determining when the government "reasonably should" have known of the alleged fraud can be especially challenging because the "'reasonableness'" requirement entails "a complex factual determination." *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 863 (10th Cir. 1993). Those burdens would be compounded in many cases by uncertainty about the identity of the "official of the United States charged with responsibility to act in the circumstances," an issue that itself has been a source of confusion and disagreement among the lower courts. *Compare United States v. Macomb Contracting Corp.*, 763 F. Supp. 272, 274 (M.D. Tenn. 1990) (holding that the Assistant Attorney General in charge of the Civil Division is the only government official whose knowledge would trigger the three-year limitations period), *with United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 777 F. Supp. 195, 204–05 (N.D.N.Y. 1991) (holding that knowledge of senior army officials in charge of the project at issue was sufficient to trigger the three-year limitations period).

These inquiries would necessitate discovery into who knew what, and when, within various branches of government and subject the government to "disruption and expense in responding to discovery requests in actions in which the government affirmatively

chose to avoid those concerns by declining to intervene." *Sanders*, 546 F.3d at 295. There is no reason to believe that Congress would have wanted to impose these burdens on the government in cases in which it decided not to participate—a decision that is itself often motivated by the government's resource constraints. *See* Victor A. Razon, *Replacing the SEC's Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement*, 47 Pub. Cont. L.J. 335, 349 (2018) ("[A]ccording to an empirical analysis of the DoJ's intervention decisions between 1986 and 2011, non-merit based factors—including resource constraints and the defendant's identity—significantly contributed to DoJ decisions to not intervene in *qui tam* cases.").

According to the Eleventh Circuit, these concerns are "overstated" because "government knowledge may be relevant to the merits of the relator's [False Claims Act] claim even in a non-intervened *qui tam* action" with respect to issues of materiality and scienter. Pet. App. 22a n.10. To be sure, government knowledge "*may be*" relevant to materiality and scienter in *some* False Claims Act cases. But materiality is principally an objective inquiry, *see Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016), and scienter typically turns solely on the defendant's state of mind (although both elements can be negated by government knowledge in some cases, *see id.* (materiality); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) (scienter)). In contrast, the government's knowledge of the alleged fraud is *always* relevant to the trigger date for Section 3731(b)(2)'s limitations period under the Eleventh Circuit's interpretation of the statute. The practical burdens that the

Eleventh Circuit's approach would impose on the government therefore dwarf those hypothesized by the Eleventh Circuit.

Any of these counterintuitive results would be sufficient, standing alone, to call into question whether Section 3731(b)(2) should be given the literalistic interpretation adopted by the Eleventh Circuit. Taken together, they leave no doubt that Congress could not have intended to authorize relators to invoke Section 3731(b)(2) where the United States has not intervened in the suit. *See Graham*, 545 U.S. at 421; *see also King*, 135 S. Ct. at 2494 (rejecting literal interpretation of statute where it was "implausible that Congress meant the Act to operate in [that] manner").

D. The Legislative History Confirms That Section 3731(b)(2) Is Only Available In Suits In Which The United States Is A Party.

The legislative history to the 1986 False Claims Act amendments provides further confirmation that Congress intended to limit the availability of Section 3731(b)(2) to suits filed by the United States or in which it intervenes.

1. Congress enacted Section 3731(b)(2) in 1986 to address a specific problem particular to the False Claims Act: the absence of a provision that would extend the government's time to file suit based on the time it took the government to discover the fraudulent conduct. The tolling provision in 28 U.S.C. § 2416(c)—which tolls the generally applicable limitations periods in 28 U.S.C. § 2415 where "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"—

was inapplicable by its terms to the False Claims Act's statute of limitations in Section 3731. And courts had held that the United States could not rely on non-statutory equitable-tolling principles in False Claims Act cases. *See United States v. Dawes*, 151 F.2d 639, 643 (7th Cir. 1945) (tolling does not apply to the False Claims Act's statute of limitations); *United States v. Borin*, 209 F.2d 145, 147–48 (5th Cir. 1954) (same).

Congress's concern about this "problem" is apparent throughout the legislative record, which makes clear that Congress enacted Section 3731(b)(2) because "the False Claims Act . . . has its own statute of limitations and is not subject to the general provision," *i.e.*, 28 U.S.C. § 2415, and its associated tolling rules. *Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Assistant Attorney General Richard K. Willard). The Department of Justice was particularly concerned about the lack of a tolling rule in False Claims Act cases because, as Assistant Attorney General Richard K. Willard explained, the government "frequently [saw] requests to sue come in right on the brink of the statute of limitations, and sometimes beyond," causing it to "miss out" on claims "because it ha[d] just taken that long to discover the fraud and get a case ready to pursue." *Id.* The Department of Justice sought the enactment of Section 3731(b)(2) because "[t]his amendment would give us a little more flexibility in bringing some cases that otherwise would be barred." *Id.* Indeed, as the accompanying House Report recognized, fraud against the government is "by nature . . . difficult" for the government "to piece together." H.R. Rep. No. 99-660, at 26 (1986); *see also id.* at 25 (noting that "fraud is often difficult to detect" and the government might not become "aware of the fraud" during

the six-year limitations period). Section 3731(b)(2) was therefore necessary to "ensure the Government's rights are not lost through a wrongdoer's successful deception." S. Rep. No. 99-345, at 15.

When adopting Section 3731(b)(2), Congress did not express any similar concerns about relators' inability to discover and investigate fraud within the existing six-year limitations period. On the contrary, the legislative history confirms that Congress considered relators to be well-positioned to discover fraud when it is still ongoing and to act quickly in response. Congress recognized that, although "[d]etecting fraud is usually very difficult" for the government, relators tend to be "close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4; *see also United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) ("One theme recurring through the legislative history" to the 1986 amendments is the intent to encourage those with "first-hand knowledge" of fraudulent conduct to report it.).

2. Not only did government-specific considerations provide the sole impetus for Section 3731(b)(2), but Congress also consistently referred to "the government" when discussing that amendment, without once mentioning relators.

The Senate Report explained that the new subsection modified the False Claims Act's statute of limitations "to permit *the Government* to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when the Government learned of a violation, whichever is later." S. Rep. No. 99-345, at 15 (emphasis added). And the House Report recognized that "the statute of limita-

tions should not preclude *the Government* from bringing a cause of action under this Act if they were not aware of the fraud," while emphasizing that a ten-year statute of repose was also necessary because the Committee "did not intend to allow *the Government* to bring fraud actions [ad infinitum]." H.R. Rep. No. 99-660, at 25 (emphases added).

The bill's principal sponsor in the House of Representatives, Congressman Fish, similarly explained that the amendment "modifies the statute of limitations to permit *the government* to bring an action within six years of when the false claim is submitted . . . or within three years after *the government* learns of the violation, whichever date is later." *Hearing*, *supra*, at 101, 108 (emphases added).

Congress carefully distinguished between the government and relators throughout the legislative history, adding weight to its singular focus on the government when discussing Section 3731(b)(2). For example, the House Report explained that the House version of the bill "expands the role of the *relator* so that when *the Government* enters an action filed by a relator, the relator remains a party to the suit." H.R. Rep. No. 99-660, at 24 (emphases added). The Report also explained that the bill placed limits on "discovery conducted by the *relator*" because of "concerns" that it could "interfere with discovery being conducted by *the Government*." *Id.* (emphases added).

Accordingly, Congress's references to, and distinctions between, the "government" and "relators" in the legislative history were purposeful and meaningful. And nothing in that history indicates that, when Congress added Section 3731(b)(2) "to permit the Government to bring an action . . . within 3 years of when the Government learned of a violation," S. Rep. No. 99-

345, at 15, it intended to extend that authorization to relators.

* * *

In sum, the Eleventh Circuit's interpretation of Section 3731(b)(2) is impossible to reconcile with the interpretive analysis that this Court applied to the same provision of the False Claims Act in *Graham*. According to the Eleventh Circuit, because Section 3731(b)'s prefatory language refers to "[a] civil action under section 3730," each of the following subsections must necessarily apply to *all* actions under Section 3730. *Graham* forecloses this simplistic reading of Section 3731(b)(2). When the phrase "[a] civil action under Section 3730" is read in context and against the backdrop of its statutory antecedents, default limitations rules, and the False Claims Act's purpose and history, as well as this Court's obligation to avoid counterintuitive results, it becomes apparent that Section 3731(b)(2), like Section 3731(d), is "limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party." *Graham*, 545 U.S. at 418.

Accordingly, in light of the government's decision not to intervene in this case, Section 3731(b)(2) is unavailable to Hunt. He was therefore required under Section 3731(b)(1) to file suit within six years of the alleged False Claims Act violations. Because Hunt waited to file suit until November 2013—more than six years after the alleged violations ended in "early 2007," J.A. 44—his suit is time-barred.

II. If Section 3731(b)(2) Applies Where The United States Is Not A Party, Then Relators Are "Official[s] Of The United States" Who Must Sue Within Three Years Of Discovering The Fraud.

If the Court decides that relators are permitted to invoke Section 3731(b)(2) where the United States has not intervened in the litigation, it should conclude that, in such cases, the relator is "the official of the United States charged with responsibility to act in the circumstances" and whose knowledge triggers the start of the three-year limitations period. Although Section 3731(b)(2) does not expressly reference relators—a further reflection of Congress's "imprecis[ion]" when drafting that provision—this interpretation is compelled by the broader statutory context in which the provision must be read. *Graham*, 545 U.S. at 415, 418.

Where a relator has filed a False Claims Act suit and the United States has declined to intervene, the statutory context demonstrates that the relator is the "official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). In such cases, the United States' "interests [are] represented" by the relator, *Eisenstein*, 556 U.S. at 934–35, who investigates and sues perpetrators of fraud against the government. A relator brings suit "in the name of the Government," 31 U.S.C. § 3730(b)(1), and, with respect to the portion of the recovery that is paid to the government, acts as a "statutorily designated agent of the United States," *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *see also* 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action

shall have the right to conduct the action."). Because the False Claims Act "deputizes private individuals to act to protect the interests of the United States" and to stand in the shoes of the United States, *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 n.8 (9th Cir. 1996), relators are the officials "charged with responsibility to act" on behalf of the United States where the government itself has declined to intervene, 31 U.S.C. § 3731(b)(2); *see also Liberty Mut. Fire Ins. Co. v. EZ-FLO Int'l, Inc.*, 877 F.3d 1081, 1085 (9th Cir. 2017) ("[T]he dynamic in which one party figuratively stands in the shoes of another is . . . a defining feature of *ex rel.* suits.").

Deeming the relator to be the relevant "official of the United States" where the government does not intervene is consistent with common usage of the term "official," which, in the appropriate context, is sufficiently broad to encompass a private "person authorized to act for a government." *Webster's Third New Int'l Dictionary* 1567 (2002).[8] Indeed, Congress has expressly defined "public official" in other contexts to include a "person acting for or on behalf of the United States, . . . under or by authority of" the government. 18 U.S.C. § 201(a)(1); *see also Dixson v. United States*, 465 U.S. 482, 499 (1984) (holding that officers of a private corporation administering federal community-

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[8] *See also Black's Law Dictionary* 1259 (10th ed. 2014) (defining "official" to include "a person . . . appointed to carry out some portion of a government's sovereign powers"); *MerriamWebster Dictionary* (defining "official" as "one who . . . is invested . . . with an office"), https://www.merriam-webster.com/dictionary/official (last visited Dec. 28, 2018); *Google Dictionary* (defining "official" as including a "person . . . having official duties, especially as a representative of an organization or government department"), https://tinyurl.com/ydcbn24x (last visited Dec. 28, 2018).

development block grants were "public officials" because they possessed a "degree of official responsibility for carrying out a federal program or policy"). Where the government declines to intervene in a False Claims Act case to represent its own interests, it is the relator who is "authorized to act for [the] government"—or, in the words of Section 3731(b)(2), who is "charged with responsibility to act in the circumstances"—by pursuing the suit on the government's behalf.

This interpretation of Section 3731(b)(2) also gives effect to the "default rule[s]" for how "Congress generally drafts statutes of limitations." *Graham*, 545 U.S. at 418. As discussed above, one of those default rules is that tolling provisions are triggered based on the knowledge of the plaintiff himself, not based on the knowledge of a nonparty to the litigation. *See Credit Suisse*, 566 U.S. at 227 ("when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff"); *see also supra* Part I.B. Interpreting the limitations period in Section 3731(b)(2) to run based on the knowledge of the relator—rather than based on the knowledge of the United States government—where the United States has declined to intervene gives effect to these settled limitations principles that formed the backdrop for Congress's enactment of Section 3731(b)(2).

In addition, this interpretation comports with the purposes animating tolling rules. The rationale behind tolling is that the limitations period should not begin to run until the "facts are, or should have been, discovered by the plaintiff," where the plaintiff "remains in ignorance of [the fraud] without any fault or want of diligence or care on his part." *Credit Suisse*,

566 U.S. at 227 (internal quotation marks and emphasis omitted). Triggering the limitations period in Section 3731(b)(2) based on the relator's knowledge where the United States has not intervened is consistent with those purposes because it affords the relator additional time to file suit where, through no fault of his own, the relator is unaware of the alleged fraud. It would make no sense, however, to continue to hold the statute of limitations in abeyance after the relator learns, or should have learned, of the alleged fraud simply because the government has not also learned of the fraud. Tolling rules are not intended to assist plaintiffs who learn about the alleged fraud but elect to "sleep on [their] rights" and then bring "stale claims" years after the discovery. *Hyatt*, 91 F.3d at 1217.

Under the Eleventh Circuit's decision, however, the timeliness of a relator's suit would not depend on the factors relevant under default tolling principles—the plaintiff's knowledge and diligence—but on whether and when the government learned of the fraud. The Eleventh Circuit's rule would thus entirely sever Section 3731(b)(2) from "the standard rule[s]" of tolling that presumptively informed Congress's enactment of that provision. *Graham*, 545 U.S. at 418 (internal quotation marks omitted).[9]

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[9] Moreover, the Court has analogized relators to assignees of government claims. *See Vt. Agency of Nat. Res.*, 529 U.S. at 773. Cases applying state-law tolling rules deem the knowledge of an assignee who files suit on the basis of an assigned claim to be relevant for tolling purposes. *See Bierman v. Int'l Bus. Machs. Corp.*, 547 F. App'x 851, 852 (9th Cir. 2013) (plaintiff's claim was time-barred under California law where the plaintiff failed to prove that both he and his assignors "lacked the knowledge necessary to discover his cause of action"); *Silva v. Allstate Ins. Co.*,

In so doing, the Eleventh Circuit's interpretation would create highly anomalous results. For example, it would penalize diligent relators and benefit those relators who affirmatively elect to withhold information from the government in order to augment the size of their potential recovery. Under the Eleventh Circuit's rule, a relator who learned about the alleged fraud the day after it occurred, withheld that information from the government, and then filed suit one day before the ten-year deadline set by Section 3731(b)(2) would have a timely claim (as long as the government did not learn of the fraud in the interim).

Contrast that with a scenario in which the government learned about the alleged fraud the day after it occurred but decided not to file suit due to resource constraints, and the relator then learned about the fraud seven years later and promptly filed suit. That claim would be time-barred under the Eleventh Circuit's rule because it was filed more than six years after the violation and more than three years after the government learned of the fraud. *See, e.g.*, *Kreindler & Kreindler*, 777 F. Supp. at 205 (ruling that a claim was time-barred under both Sections 3731(b)(1) and 3731(b)(2) where the United States learned of the alleged fraud eight years before suit was filed but the

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304 F. App'x 609, 611 (9th Cir. 2008) (holding that an assignee was not entitled to tolling under Hawaii law because he "was aware of the nature of his injuries and failed to pursue his right diligently"); *CitiMortgage, Inc. v. Parille*, 49 N.E.3d 869, 883 (Ill. App. Ct. 2016) (same under Illinois law); *SBAM Partners v. Oh*, No. B168187, 2004 WL 2580424, at *5 (Cal. Ct. App. Nov. 12, 2004) (plaintiff had the "burden to plead specific facts showing that both it and its assignor had an inability to discover the [basis for a cause of action] with the exercise of reasonable diligence").

relator may have learned of the fraud less than three years before suit was filed).

If the relator is deemed to be the relevant "official of the United States" whose knowledge starts the limitations period, however, then the suit filed by the relator in year seven promptly after discovery of the fraud would be timely and the suit filed by the relator who delayed for ten years would be time-barred. There is no reason why Congress would have intended Section 3731(b)(2) to reward relators who withhold information from the government and sit on their rights for up to a decade, and simultaneously bar diligent relators from the courthouse. The Court should not countenance an outcome that is so "difficult to fathom." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989).

In addition, deeming the relator to be the relevant "official of the United States" would mitigate a number of the counterintuitive results that would otherwise arise from authorizing relators to invoke Section 3731(b)(2) where the United States has not intervened. *See supra* Part I.C. For example, the relator would no longer have more time to sue than the government in some factual settings where they are similarly situated. Linking the limitations period to the relator's knowledge in cases where the government is not a party—and to the government's knowledge where it is a party—would mean that the relevant statute of limitations would be six years whether the relator or the government learned about the alleged fraud on the day after it occurred and subsequently filed suit. But, under the Eleventh Circuit's rule, a relator would have longer to sue than the government because the relator's discovery of the fraud would not trigger the limitations period in Section 3731(b)(2).

The relator could therefore wait a full ten years after discovery to file suit (as long as the government was kept in the dark about the fraud)—even though the government itself would have only six years from discovery to file.

Deeming the relator to be the relevant "official of the United States" in non-intervened actions would also address the concerns about rendering Section 3731(b)(1) largely superfluous in cases in which the United States is not a party. Section 3731(b)(1) would be a more favorable statute of limitations for relators whenever they learned about the fraud within three years of its occurrence. Under the Eleventh Circuit's rule, however, Section 3731(b)(1) would be superfluous in non-intervened suits as long as the government did not learn of the alleged fraud within three years of its occurrence. As Congress recognized when enacting the 1986 False Claims Act amendments, it is far more likely that a private party, rather than the government, will discover fraud soon after it is perpetrated against the government. *See* S. Rep. No. 99-345, at 4 ("[d]etecting fraud is usually very difficult" for the government, whereas relators tend to be "close observers or otherwise involved in the fraudulent activity").

Finally, treating the relator as the relevant "official of the United States" would eliminate the discovery burdens on the United States in cases where it has made the affirmative decision not to intervene. Because the limitations period in Section 3731(b)(2) would start to run based on the knowledge of the relator, rather than the knowledge of the government, resolution of a statute-of-limitations defense would not necessitate discovery into the government's knowledge about the alleged fraud where the United States is not a party to the suit.

* * *

If this Court concludes that Congress intended to make Section 3731(b)(2) available to relators where the United States is not a party to the case, the statutory context, structure, and purpose demonstrate that the relator is the "official of the United States charged with responsibility to act in [those] circumstances." 31 U.S.C. § 3731(b)(2). Because it is undisputed that Hunt knew about the alleged fraud in this case more than three years before he filed suit, Pet. App. 34a—and because he filed suit more than six years after the alleged violations—his suit is time-barred under both Sections 3731(b)(1) and 3731(b)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY ADDENDUM

False Claims Act

31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material

to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

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[1] So in original. Probably should be "101–410".

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the

complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court

determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclu-

sion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

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[2] So in original. Probably should be "General".

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Govern-

ment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2)[3] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

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[3] So in original. Probably should be "(ii)".

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[4] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or

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[4] So in original. Probably should be preceded by "section".

attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

31 U.S.C. § 3733. Civil investigative demands

(a) In General.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy

was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act[5] investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

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[5] So in original. Probably should be "law".

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such stand-

ards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial juris-diction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person

that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the

production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth

with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator

shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for ex-amination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice

of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set

aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last

pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery

was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits,

or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.